Supreme Court, U.S.
FILED
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No. 93-2044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SHERMAN L. SHAW,
Petitioner,

vs.

FRANK W. MASTERS, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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July 17, 1994

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court below properly sustained a motion for summary judgement?

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OPINIONS BELOW

Opinion of the District Court for the District of Kansas (Petitioner's Appendix A-1) is not reported, but is reported in entirety in Respondent's Brief in Opposition as Appendix A. The opinion of the Court of Appeals for the Tenth Circuit (Petitioner's Appendix A-5) is not reported, and is likewise appended in its entirety as Appendix B.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT OF FACTS

The facts of the case are stated fully in the decisions of the District Court (Respondents Appendix A) and the Court of Appeals (Respondents Appendix B).

REASONS TO DENY WRIT OF CERTIORARI

The respondents oppose the petition for writ of Certiorari on five grounds:

1. Petition for Writ of Certiorari Fails to State Sufficient Reason for Consideration and Review by this Court.

Supreme Court Rule 10 provides, "A petition for a Writ of Certiorari will only be granted when there are special and important reasons therefore." The petition states neither a valid federal question nor an important or special reason calling for the exercise of this Court's supervision. The decision below is consistent with prior opinions of this Court as well as other federal appellate courts. Moreover, Petitioner's questions fail to rise to the level of character of questions considered by this Court on a Writ of Certiorari.

The petition merely appears to reiterate unfounded and bizarre allegations summarily dismissed on their merits when Petitioner completely failed to produce any support or evidence to substantiate his claims.

2. Petition for Writ of Certiorari is not in Compliance with Rule 14.

Supreme Court Rule 14.5 provides that petitioner's failure to "present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Under Rule 14.1 (j), the

argument presented must be direct and concise. The petition is neither direct nor concise but appears to be argumentative and repetitious of the unsupported claims dismissed in the District Court of Kansas and the Tenth Circuit. The questions presented by petitioner are unclear to the point of being nonsensical. Aside from the complete lack of merit to these contentions, petitioner fails to argue with any clarity or accuracy which would lead to a "ready and adequate understanding of the points requiring consideration" as required by Rule 14.5.

Additionally, Respondent points out that petitioner fails to comply with various procedural requirements mandated in Rule 33.

3. The Decision Below is Reasonable.

The Tenth Circuit decision is soundly based on well settled principles of law. To recover in a civil rights action under 42 U.S.C. §1983, petitioner must do more than allege a constitutional right and then claim a violation by respondent. Hannula v. City of Lakewood, 907 F.2d 129, 132 (10th Cir. 1990). In order to overcome a motion for summary judgment based on qualified immunity in a §1983 action against a state official, Petitioner must offer more than conclusory and nonspecific allegations that the official violated clearly established law. Pride v. Does, 997 F.2d 712 (10th Cir. 1992); Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988).

Petitioner must show substantial correlation between the conduct in question and prior law, establishing that Respondent's actions were clearly prohibited. Hovater v. Robinson, 1 F.3d 1063 (10th Cir. 1993).

Upon asserting peculiar conduct by the Sheriff,

Petitioner has been afforded every opportunity to provide supporting evidence of his claim. Petitioner refuses to come forth with any evidence, medical tests, or meaningful substantiation to support his allegations.

Respondent's statement of facts denies any contact with Petitioner and therefore no violation of Petitioner's constitutional rights. Where such statements remain uncontroverted, the court below correctly held that there was no genuine issue of material fact and summarily dismissed the claim on its merits. The Tenth Circuit Court of Appeals, under standards well established by this court, could reach no contrary result. Therefore, the decision below was reasonable and not clearly erroneous.

4. The Decision is Wholly Consistent with the Decisions of This Court.

This court has clearly established the well settled principle that summary judgment is proper where any essential element of Petitioner's case is without factual support. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L. Ed. 2d 256, 274 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986).

Where the doctrine of qualified immunity has been established, government officials are protected from civil liability when their conduct fails to violate clearly established constitutional or statutory right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Accordingly, Petitioner bears the burden of convincing the court that when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have

understood that his acts were unlawful. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

Petitioner has been given more than ample opportunity to provide the district court with factual support to corroborate his claim. After repeated failure to show any genuine issue of material fact, summary dismissal is proper. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct 2505, 91 L. Ed. 2d 202.

Accordingly, the petition submitted does not merit review by this Court pursuant to Supreme Court Rule No. 10.

5. There is no Conflict Among the Circuits.

The decision of the Tenth Circuit Court of Appeals is in full accord with all other federal appellate courts.

The Fifth Circuit recently affirmed a decision holding that the burden is on the civil rights plaintiff to overcome the state actor's defense of qualified immunity. The court further stated that the plaintiff must show that the state actor's conduct was not objectively reasonable, but violated clearly established law, and plaintiff must plead specific facts with a level of particularity so they would, if proved, warrant the relief plaintiff seeks. Burns-Toole v. Byrne, 11 F.3d 1270 (5th Cir. 1994).

Where an inmate failed to refute affidavits indicating that a prison official was not responsible for direct or indirect medical treatment or lack thereof, the Sixth Circuit affirmed summary judgment in a §1983 action. Ritchie v. Wickstrom, 938 F.2d 689 (6th Cir. 1991) reh. and reh. en banc denied (Sept. 24, 1991).

The Seventh Circuit likewise approves of summary

judgment in favor of a government official claiming qualified immunity from civil rights liability where plaintiff fails to show evidence of his claim. The court held that summary judgment is warranted if the uncontested facts revealed that the official's acts do not invade the plaintiff's clearly established constitutional rights. Nelson v. Streeter, 16 F.3d 149 (7th Cir. 1994).

Where a prisoner provided no facts to support his claims of discrimination or conspiracy, the Eighth Circuit held that allegations of civil rights violations by prison officials did not preclude summary judgment. Bellecourt v. United States, 994 F.2d 427 (8th Cir. 1993), cert. denied 62 U.S.L.W. 3550 (1994).

The Eleventh Circuit has also held that a plaintiff in a §1983 action must show that the person acting under color of state law has deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States. Duke v. Smith 13 F.3rd 388 (1994).

Where the appellate courts are in agreement, Petitioner's questions presented do not merit review by this Court under Rule 10.

CONCLUSION

In consideration of Supreme Court Rule Nos. 10, 14, 33, and further reasons set forth above, the petition for certiorari should be denied.

RESPECTFULLY SUBMITTED,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SHERMAN L. SHAW,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	No. 92-2519-GTV
FRANK W. MASTERS, et al.,	)	
	)	ENTERED ON
Defendants.	)	THE DOCKET
	)	DATE: 6/29/93

MEMORANDUM AND ORDER

Plaintiff Sherman L. Shaw, appearing pro se, brought this action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand, alleging that they deprived him of constitutional rights in violation of the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985. The case is before the court on the following motions:

(Doc. 20) - The motion of defendant Allenbrand for summary judgment pursuant to Fed.R.Civ.P. 56(b);

(Doc. 29) - The motions of defendants Budig and McFadden for summary judgment pursuant to Fed.R.Civ.P. 56(b) and for sanctions pursuant to Fed.R.Civ.P. 11; and

(Doc. 31) - The motions of defendants Masters and Robinson for summary judgment pursuant to Fed.R.Civ.P. 56(b) and for sanctions pursuant to Fed.R.Civ.P. 11.

Plaintiff has responded and opposes defendants' motions (Docs. 28 and 33). For the reasons stated below, the motions for summary judgment are sustained and the motions for sanctions are overruled.

SUMMARY JUDGMENT STANDARDS

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issues of material fact. This burden may be discharged by "showing," that is, pointing out to the district court, that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, "a party opposing . . . may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id.

BACKGROUND

Before setting out the uncontroverted facts in this

case, the court will summarize plaintiff's allegations. Plaintiff alleges that in November, 1989, he sustained burns to his legs for which he was transported to the University of Kansas Medical Center (KUMC). He alleges that on December 12, 1989, while in surgery at KUMC, defendants, or their agents, surreptitiously implanted an electronic surveillance device in his left thigh. He alleges that defendants "bugged" him in order to eavesdrop on his conversations and to keep track of his movements. He also alleges that helicopters and agents of defendant Allenbrand, the Sheriff of Johnson County, Kansas, are using the "bug" to pursue and harass him. Based on those allegations, plaintiff claims defendants deprived him, and conspired to deprive him, of various constitutional rights. He now sues defendants Masters, Robinson, Budig, and McFadden in their official and "personal" capacities as agents of KUMC, and defendant Allenbrand as the Sheriff of Johnson County, Kansas. To remedy the alleged civil rights violations, plaintiff seeks $10,000,000 in compensatory damages and $30,000,000 in punitive damages.

In their motions for summary judgment, defendants have set forth statements of material fact that they offer to the court as uncontroverted. Those statements of fact are supported by affidavits that are attached to their motions. Those facts are offered to show that defendants did not deprive plaintiff of any constitutional rights. Plaintiff, in his opposition and supplemental opposition to the motions, has failed to controvert any of the material facts defendants offer as uncontroverted. Therefore, pursuant to Fed.R.Civ.P. 56(c) and D.Kan. Rule 206(c), the court deems the following facts admitted:

Plaintiff is a long-time resident of Kansas City,

Missouri. Defendants Masters and Robinson are medical doctors who are, or were, professors at KUMC. Defendant Masters retired from the practice of medicine in July, 1989, four months before plaintiff was treated at KUMC. Defendant Robinson retired from the practice of medicine in 1985, four years before plaintiff was treated at KUMC. Defendant Budig is the Chancellor of the University of Kansas. Defendant McFadden is an attorney who represents KUMC. None of these defendants were involved in the treatment of plaintiff at KUMC in December, 1989.

Defendant Allenbrand, as stated above, is the Sheriff of Johnson County, Kansas. Neither he nor anyone in his office has ever had contact with plaintiff (other than a letter written by plaintiff informing him of this action). The Johnson County Sheriff's Department does not presently maintain, nor has it ever maintained, a helicopter. Defendant Allenbrand was not involved in the treatment plaintiff received at KUMC in December, 1989.

DISCUSSION

Defendants move the court for summary judgment on several grounds. In his motion, defendant Allenbrand contends that the uncontroverted facts disclose that he is entitled to judgment as a matter of law on plaintiff's claims. In their motions, defendants Masters, Robinson, Budig, and McFadden contend that the uncontroverted facts disclose that they are entitled to judgment as a matter of law because: (1) they are immune under the Eleventh Amendment; (2) they were not directly or indirectly involved in the surgical procedure underlying this action; and (3) the statute of limitations bars plaintiff's claims. The court will address defendants' motions separately.

Allenbrand's Motion

Plaintiff alleges that defendant Allenbrand deprived him of constitutional rights because defendant Allenbrand was involved in the placement of the "bug" in his thigh and because defendant Allenbrand and his deputies have used that "bug" to eavesdrop on his conversations and to keep track of his movements. Plaintiff also claims that defendant Allenbrand has sent helicopters and an "army" into Kansas City, Missouri, to pursue and harass him. The court concludes that defendant Allenbrand is entitled to summary judgment on these claims. The uncontroverted facts are that defendant Allenbrand and his agents have had no contact with plaintiff whatsoever. There is no evidence that defendant Allenbrand was involved in plaintiff's treatment at KUMC in December, 1989. There is no evidence that defendant Allenbrand has sent helicopters or an "army" to pursue or harass plaintiff in Missouri. In fact, defendant Allenbrand has no helicopters at his disposal. Based on the uncontroverted facts, the court concludes that defendant Allenbrand has not deprived plaintiff of any constitutional rights in violation of section 1983 or 1985. His motion for summary judgment is sustained.

Masters', Robinson's, Budig's, and McFadden's Motions

Plaintiff alleges these defendants, as employees of KUMC, deprived him of constitutional rights because they performed, oversaw, or attempted to conceal the surgical implantation of the surveillance device in his left thigh. Based on the uncontroverted facts of the case and the present state of the law as applied to those facts, the court concludes that these defendants are entitled to judgment as a matter of law on plaintiff's claims. To the extent that they

are sued in their official capacities as agents or employees the KUMC, which is a state agency, they are immune from suit under the Eleventh Amendment. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); also Brennan v. University of Kansas, 451 F.2d 1287, 1290-91 (10th Cir. 1971). To the extent that they are sued in their personal capacities the uncontroverted evidence is that they were not involved directly or indirectly in any actions taken for or against plaintiff in December, 1989, and are thus entitled to judgment as a matter of law on those claims. Additionally, as these defendants note, the surgical procedure underlying this action occurred in December, 1989, more than two years preceding the filing of this action. Therefore, plaintiff's claims are barred by the two-year statute of limitations. See Garcia v. Wilson, 471 U.S. 261 (1985). Defendants Masters, Robinson, Budig, and McFadden are entitled to summary judgment on plaintiff's section 1983 and 1985 claims.

As a final matter, defendants have moved for sanctions, or in the alternative for an order prohibiting plaintiff from instituting another action in this district for any alleged injuries arising out of the treatment he received at KUMC in December, 1989. As sanctions, defendants seek to recover their attorneys' fees. The court denies the motion for sanctions. However, if plaintiff files another action in this district regarding the events described in his complaint, the court will impose sanctions on plaintiff and order him to pay defendants' attorneys' fees.

IT IS THEREFORE, BY THE COURT ORDERED that defendants' motions for summary judgment (Docs. 20, 29 and 31) are sustained. The case is hereby dismissed.

IT IS FURTHER ORDERED that defendants' motions for sanctions are overruled. However, if plaintiff files another action in this district regarding the events described in his complaint, the court will impose sanctions on plaintiff.

Copies of this Memorandum and Order shall be mailed to counsel of record for defendants and to plaintiff personally.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 25th day of June, 1993.

/s/_____
G.T. VAN BEBBER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SHERMAN L. SHAW,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 93-3289
	)	D.C. No. 92-2519-GTV
	)	(D. Kan.)
FRANK W. MASTERS, Clinical Professor; DAVID W. ROBINSON, Professor; GENE ARTHUR BUDIG; JOHN C. MCFADDEN, Associate General Counsel, as members of the University of Kansas Medical Center; FRED ALLENBRAND, Sheriff of Johnson County,	)	
	)	
Defendants-Appellees.	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT*

Before SEYMOUR, Chief Judge, McKAY, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Sherman Shaw brought a pro se civil rights action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand claiming they deprived him of his constitutional rights in violation of 42 U.S.C. § § 1983 and 1985. The district court granted defendants' motions for summary judgment. Rec. vol. II, doc. 38. Defendant then filed a motion to amend the judgment. Rec., vol. II, doc. 40. The

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 22, 1993.

district court treated Mr. Shaw's motion as a motion for reconsideration and overruled it for lack of merit. Rec., supp. vol. I, doc. 50. We affirm.

Mr. Shaw was transported to the University of Kansas Medical Center (KUMC) in November 1989 to receive treatment for severe burns he sustained as the result of a fire. While at KUMC, Mr. Shaw underwent surgery and skin grafts on his legs and thighs. He alleges that on December 12, 1989, while in surgery at KUMC, defendants or their agents surreptitiously implanted an electronic surveillance device in his thigh for the purpose of monitoring his conversations and movements. He also alleges that defendant Allenbrand, the sheriff of Johnson County, Kansas, has used the "bugging" device in his thigh to monitor him, and has sent helicopters and agents into Kansas City, Missouri, to pursue and harass him.

In its memorandum and order, the district court considered both the facts of this case and the applicable law and granted defendants' request for summary judgment. We affirm substantially on the basis of the district court's decision. In addition, we review the district court's denial of Mr. Shaw's motion to amend for abuse of discretion. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992). The district court specifically noted that, after reviewing Mr. Shaw's motion, "it articulates nothing warranting reconsideration of the court's previous Memorandum and Order." Rec. supp. vol. I, doc. 50 at 1. Because we find no abuse of discretion, we affirm.

Finally, in an apparent attempt to continue this suit despite the district court's decision below, Mr. Shaw has filed before this court additional pro se motions seeking to

drop defendant Allenbrand from the suit and to join Robert Stephan, the Attorney General for the State of Kansas, as well as four individual members of the Kansas Surgery Association and the insurance carrier of the Kansas Surgery Association. Mr. Shaw had ample opportunity to bring such motions before the district court. Indeed, in his motion to amend, Mr. Shaw requested the substitution of certain parties, but the district court overruled Mr. Shaw's motion as meritless. It is improper to add parties on appeal and Mr. Shaw's motion is therefore denied.

The decision below is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Chief Judge